

NO. 34946-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

COREY BURNAM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Raymond F. Clary, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

The parties agreed Corey Burnam killed his girlfriend, Alicia Sweet. The essential question at trial was why. The State argued Burnam suspected Sweet of infidelity and murdered her with premeditated intent. Burnam pled self-defense. He agreed he was larger and stronger than Sweet. He agreed they were both methamphetamine users. He agreed that he had escaped the encounter with a black eye, minor scrapes, and a single deep cut on his finger. In light of this background, his testimony that Sweet had first assaulted him with a switchblade and a rifle barrel did not seem plausible, and did not seem to justify the intensity of his response, or the depth of his alleged fear. The jury convicted him.

But the jury had been deprived of critical evidence. On the night of the incident, Burnam knew that Sweet had been involved in a prior homicide, had assisted in that homicide, and had escaped with a conviction for rendering criminal assistance. This knowledge was key to understanding why Burnam genuinely feared for his life.

This case presents the issue of whether the trial court can exclude a defendant's own testimony about his own belief, an essential element of his self-defense claim, or whether doing so violates a defendant's constitutional right to present a defense.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding all evidence of Burnam's belief of Sweet's involvement in a prior homicide, where this ruling encompassed both Burnam's direct testimony as well as other corroborating evidence.

2. The trial court erred in finding Burnam did not make an adequate offer of proof of his anticipated testimony and other corroborating evidence to establish he reasonably feared Sweet.

3. The trial court erred in concluding Burnam's testimony had minimal probative value and was not relevant to any essential element of self-defense.

4. The trial court erred by failing to apply the correct legal standard to Burnam's testimony offered for the purpose of establishing the reasonable fear element of his self-defense claim, and in finding this standard was not met.

5. The trial court erred in finding Burnam's testimony was uncorroborated or otherwise insufficiently supported to allow for admissibility.

6. The trial court erred in concluding Burnam's testimony must or could be excluded on the basis of prejudice to the State.

7. To the extent the trial court concluded Burnam's testimony was inadmissible to show character evidence, and thus was entirely inadmissible, this conclusion was in error.

8. The trial court erred in concluding binding precedent required the exclusion of Burnam's testimony and corroborating evidence.

Issues Pertaining to Assignments of Error

1. Burnam's attorney advised the trial court Burnam would testify that he knew Sweet had been involved in prior murder committed by Bud Brown (Burnam's cousin and Sweet's ex-boyfriend), and that Sweet was convicted of rendering criminal assistance for disposal of the murder weapon. Given the above, did the trial court err in finding Burnam made no offer of proof regarding his testimony?

2. Where Burnam asserted self-defense and offered testimony regarding the reasonableness of his belief that Sweet intended to and was capable of killing him, did the trial court's exclusion of this evidence violate Burnam's right to present a defense? Did the trial court similarly err in excluding corroborating evidence, including sections of Burnam's recorded interrogation by Detective Kirk Keyser?

3. Where Burnam sought to testify to his belief of Sweet's involvement, did the trial court apply an incorrect legal standard by

reasoning Burnam had failed to establish that Sweet's involvement was more likely than not?

C. STATEMENT OF THE CASE

1. Charges & Defense

The Spokane County Prosecutor's Officer charged Corey Burnam with first degree murder (count I) and with interfering with the reporting of domestic violence (count II). CP 12-13.¹ The State accused Burnam of killing his girlfriend, Alicia Sweet, with premeditated intent while armed with a deadly weapon. CP 12. The State also accused him of attempting to prevent household member, Norman Anderton, from calling 911 after the incident. CP 13.

Burnam asserted self-defense and advised the court and State of his intention to testify at trial. E.g. RP 202.

2. Motion in Limine

Prior to trial, Burnam notified the court of his intention to testify to his belief, held at the time of the incident, that Sweet had been involved in a previous homicide. CP 20-23; RP 208-13. Burnam offered this testimony for two purposes (1) primarily to explain the reasonableness of his belief that his life was in danger when Sweet assaulted him, and (2)

¹ The information listed second degree murder as an alternative to count I. CP 12.

secondarily as evidence of Sweet's character for aggression to corroborate his contention that Sweet was the first aggressor. CP 21; RP 208-13.

The State moved to exclude Burnam's anticipated testimony that Sweet was involved in a prior homicide, reasoning it was inadmissible character evidence. Supp. CP ____ (sub. no. 57, Plaintiff's Motion for Exclusion of Character Evidence of Victim (hereinafter "State's Motion"), p. 1).

Both the State and defense agreed Burnam's cousin, Bud Brown, had been charged with a previous murder. RP 209. Brown and Sweet had been dating at that time. RP 219. Sweet pled guilty to rendering criminal assistance for disposal of the murder weapon. RP 209. At the time of Burnam's trial, Brown's charges were still pending while Brown served prison time in Florida on an unrelated offense. RP 223.²

² The parties also discussed several other documents pertaining to Sweet's alleged involvement in the Bud Brown murder case. However, the parties did not appear to contemplate that these documents would be offered to the jury, but rather used them to argue to the trial court about the credibility of Burnam's anticipated testimony.

The State attached to its motion an Information charging Sweet with rendering criminal assistance and two reports by the primary investigating officer, discussing interviews of Brown, Sweet and others. Supp. CP ____ (sub. no. 57, State's Motion, pp. 9-33). The State offered these documents to show that Burnam's anticipated testimony was not credible, reasoning the documentary evidence established only that Sweet was charged with rendering criminal assistance, not deeper involvement in the prior homicide. Supp. CP ____ (sub. no. 57, State's Motion, p. 2). Burnam offered the State's attached documents in an effort to establish by a preponderance of the evidence that the prior incident involving Sweet had occurred. CP 22-23. Burnam argued the detective's report showed that although Sweet was only charged with rendering criminal assistance, law enforcement believed Sweet to be more involved in the homicide than the ultimate charge suggested. CP 23. However, trial counsel stated he did not anticipate asking any State

During a hearing on the motion, Burnam explained his anticipated testimony would establish Sweet had a knife and struck him with a rifle barrel, both Burnam and Sweet had used methamphetamine before she assaulted him, and Burnam had defensive wounds. RP 209-10, 213. He sought to testify that Bud Brown was his cousin, Sweet and Brown were involved in a prior homicide, and Burnam “had some direct knowledge of her involvement in that situation.” RP 209.

Burnam argued the purpose of his testimony was to establish the reasonableness of his belief that Sweet intended to and was capable of killing him, and to establish the reasonableness of his response. RP 213, 219. He argued this testimony was critical to his self-defense claim, and under this theory, ER 405³ did not apply. RP 220-22. He also anticipated his testimony would show Sweet was the first aggressor. RP 219.⁴

witness to offer any evidence at trial on the matter of Sweet’s involvement in the prior homicide. RP 208-09.

³ ER 405 provides the following two methods of proving character:

(a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct.

⁴ Trial counsel stated he did not intend to go into evidence regarding the rest of Sweet’s criminal history. RP 111. Trial counsel also explained that he did not intend Burnam to

Burnam argued the relevance of the testimony was not whether or how much Sweet was involved in the incident, but rather Burnam's belief of her involvement in the incident, and its impact on his mental state. RP 221-22. He argued that exclusion of evidence regarding his mental state and of Sweet's character for aggression would remove his ability to present a defense. RP 223.

Burnam also argued that his testimony was relevant, and in fact necessary, to explain why he feared for his life. RP 209. Burnam's understanding of her involvement indicated Sweet had a "willingness to be complicit in" a homicide involving a .22 caliber handgun, a weapon the defense argued is "designed to inflict ... pain." RP 230-31. Burnam's fear was not solely based on the fact that Sweet was under the influence of methamphetamines, had struck him with a rifle barrel, and a knife was involved. RP 209.

It was anticipated (and later confirmed) that State witnesses would testify there was no domestic violence between Sweet and Burnam. RP 210, 223, 287, 845-46. As a result, without more explanation, Burnam's fear of Sweet, and his actions in response, would appear unreasonable, defeating his self-defense claim. RP 209-10. This was particularly true

testify to the jury regarding the basis of his knowledge of Sweet's involvement in the prior homicide, stating he agreed that would involve hearsay conversations with Sweet or Brown, and may expose his client to criminal liability. RP 211, 222.

where the defense anticipated the State would seek to undermine his self-defense claim with evidence of Sweet's extensive wounds, and an argument that Burnam went too far. RP 224. It was essential to his self-defense claim that he be allowed to explain why he felt the need to defend himself so forcefully. RP 224.

The State argued Burnam's expected testimony was inadmissible character evidence, "victim bashing," purely speculative, and inadmissible hearsay. RP 214-17.

The trial court found there was no evidence that it is more likely than not that Sweet committed a violent act. RP 250. The court's ruling also suggested Burnam's offer of proof was insufficient regarding what he knew or the basis for his knowledge. See RP 246-47, 250. The court characterized Burnam's anticipated testimony as Sweet's "character trait for alleged violence" and reasoned it created unfair prejudice to the State and created a danger of misleading or confusing the jury with an alleged but uncharged murder. RP 251. The court concluded a "victim's character trait for alleged violence is not an essential element of a self-defense claim." RP 251 (citing State v. Hutchinson, 135 Wn.2d 863, 959 P.2d 1061 (1998)). The court ruled, "I'm not going to allow the trait, the proffered trait testimony in respect to Ms. Sweet." RP 252.

3. Trial Evidence

The primary dispute at trial was not whether Burnam had killed Sweet, but whether he had acted in self-defense.

In January 2016, Sweet and Burnam were dating. RP 268, 843. They lived in a room in the home of Sweet's friends, Pamela Schumer and Norman Anderton. RP 269, 271, 286. Burnam and Sweet had no history of domestic violence. RP 287, 845-46. Burnam was larger and stronger than Sweet. RP 836-37. He was approximately 40 years old and she was approximately 30 years old. RP 844.

Schumer testified that in a prior conversation, Burnam mentioned possible infidelity on the part of Sweet. RP 291. However, her testimony on this point was somewhat imprecise. Initially, Schumer testified that Burnam stated, "I think she's messing around on me." RP 291. Immediately after this testimony, she clarified, "But he didn't like come to my face or anything and say I think she is, you know." RP 291. The trial court overruled an objection to leading, noting "this witness is having a difficult time." RP 292. Schumer then clarified again, "He mentioned the same, you know, doesn't believe she is, but she better not be, you know." RP 292. Schumer rephrased her understanding of the conversation a third time, stating, "He doesn't want to believe that she is, you know, he would

hope not,” and stated that she did not perceive the statement “better not be” as a threat. RP 294.

Burnam testified that the day before the incident, Schumer and her friend had told him to “maybe start looking for another girlfriend.” RP 840-41. He conceded this made him upset, but stated he had no suspicion of infidelity by Sweet. RP 840-41.

It was undisputed that on January 29, 2016, while in their shared bedroom, Burnam stabbed Sweet multiple times in the neck and struck her in the head with a rifle barrel. RP 823-25. Items were strewn about the room and partially blocked the door, consistent with a struggle. RP 289, 518, 824.

Burnam testified he had used methamphetamine and marijuana the previous day. RP 812-13. That day, Sweet accused him of having taken her drugs from her purse. RP 812. Burnam admitted he had taunted her, and she was “really upset” and “getting agitated.” RP 812. Sweet then took two hits of methamphetamine. RP 813. Burnam continued to laugh at her, because he had not taken her drugs and there was no reason for her to become upset. RP 814-15. Sweet then grabbed his folding knife that was in the room, swung around, and stood facing him. RP 816. Burnam described that “[s]he just stood there ... she had a look in her eye like, like I don’t know what, she just took a hit off the bong and she just woke up ...

I can't really say. You would have to get high to understand the high that you're getting when you smoke the stuff" RP 816.

Burnam did not stand up and made an effort not to make eye contact so as not to provoke her further. RP 816. She "tried to take a quick stab," as if she was "warming up" but did not make contact with him. RP 817. Burnam still did not stand, feeling he had nowhere else to go and the situation was not too serious. RP 817. Sweet tried to stab him again, but he put his hand up and she did not make contact. RP 818. He responded saying, "He[y] you almost stabbed me in the face again" and, "What the f[---] are you doing?" RP 818. Burnam could see Sweet was going to attempt to stab him again. RP 818. Sweet grabbed Burnam by his clothes and stabbed him in the finger of his left hand. RP 818-19.

Burnam then grabbed Sweet. RP 820. She was on top of him, facing away from him, and he was holding her wrists while she still held the knife. RP 820. They struggled like this for more than 10 minutes. RP 820. Burnam told Sweet he would let her go if she would just drop the knife, but she did not. RP 820. They rolled off the bed and still Sweet would not let go of the knife. RP 821. Burnam believed that if he let her go while she was still holding the knife, she would stab him. RP 821. Burnam also testified he believed Sweet was injured by the knife during

this tussle because he was keeping her hands close to her chest and she was still holding the knife as they rolled. RP 861-62.

Eventually, Sweet dropped the knife and Burnam shoved her off of him, toward a corner of the room. RP 821. Burnam, still laying on the bed on his back, searched for and grabbed the knife, but did not stand up or attempt to attack Sweet. RP 822, 862-63. Sweet then hit Burnam in the face with a rifle barrel. RP 822-23. Burnam stated she hit him so hard he was "seeing dots" and "was scared there is something wrong." RP 823.

In response he "lunged up," "swinging," and stabbed Sweet several times in the neck with the knife. RP 823, 860. Burnam testified he did this in an attempt to save his life and avoid being hit with the rifle barrel again. RP 860. They "both crashed to the floor" and Sweet dropped the rifle barrel. RP 822, 897. He immediately went to the bedroom door to try to get out, but could not open the door because there were too many items blocking the doorway as a result of their struggle. RP 824, 890. He turned around, intending to go out the window and saw Sweet was sitting up on the floor, again holding the rifle barrel. RP 890. Burnam tried to grab the rifle barrel away from her and they struggled with it. RP 898. Holding the rifle barrel at the middle and muzzle end, Burnam struck Sweet twice in the head with the breech end. RP 825, 909-11, 915. He

stated his intent was to knock her out so he could exit the room through the window without being stabbed or hit from behind. RP 912, 923.

Sweet let go of the rifle barrel, sat back, and put her hands on her face. RP 917. She was still breathing and her eyes were open, and she gave Burnam a look to indicate that she did not want to continue fighting. RP 923. Burnam dropped the rifle barrel and exited the room by the window. RP 917.

Burnam testified that he was not thinking during the whole incident, other than to think that Sweet was trying to kill him, at various points she had possession of two deadly weapons, and he needed to protect himself. RP 888.

Aside from Burnam and Sweet, no one directly observed the events in the room. RP 279. Anderton, the only other person present in the residence, testified that while in the living room, he heard thumps from the bedroom, and later heard Burnam exit the bedroom and enter the kitchen. RP 271-72, 827. After observing Burnam at the sink with a knife in his hand, he went to the bedroom where he observed blood and a partial view of Sweet laying on the ground. RP 272-74, 827. Anderton attempted to use his cell phone, but after a brief interaction, Burnam grabbed the phone out of his hand. RP 274, 828. Anderton left the residence and called 911 from another location. RP 276-77, 828.

Anderton was the only person to observe Burnam immediately after he left the bedroom. Both Anderton and Burnam testified that Burnam's actions were consistent with a person in shock. RP 281, 954, 963.

Burnam also left the residence. RP 276, 829. He approached a truck in the driveway, but then fled on foot. RP 276, 829. After making his way through the neighborhood and briefly interacting with a neighbor, Burnam hid under a nearby trailer. RP 296-98, 425, 829-32. Officers used a K-9 to assist in tracking and dragging Burnam out from underneath the trailer. RP 425, 429, 833. Burnam resisted. RP 435, 833. An officer testified Burnam attempted to pry the dog off of his arm with his left hand. RP 435. Burnam testified that as he was arrested, he told officers that Sweet had tried to kill him. RP 833.

During the trial, an important issue arose regarding the Detective Keyser's interrogation of Burnam conducted shortly after Burnam's arrest. RP 990. The State moved to exclude any reference to the existence of the video recording of the interrogation, and to allow only the detective's live testimony. RP 990. The State argued the court had previously ruled that no evidence was admissible on the subject of the prior homicide involving Bud Brown, but Burnam and Detective Keyser discussed this topic multiple times during the interrogation. RP 989-90.

Again suggesting that Sweet was more involved than her rendering criminal assistance conviction suggested, defense counsel clarified that during the interrogation, the detective's questions showed that law enforcement initially suspected Burnam had killed Sweet in an effort to silence her prior to Brown's trial. RP 992. Counsel argued that Burnam and Detective Keyser's discussion of Bud Brown was relevant to Burnam's case, and should be included because it showed that despite being accused of an intentional killing, he consistently and repeatedly asserted during the interrogation that he feared for his life and acted in self-defense. RP 993.

However, "based on the Court's prior ruling," trial counsel then stated that the discussion of Bud Brown could be redacted. RP 994, 996. The State agreed and the redacted video of Burnam's interrogation by Detective Keyser was played for the jury. RP 996, 1011-12.⁵

Officers who observed Burnam's injuries noted a dog bite on his wrist, lacerations on his fingers, a black eye, and scratches on his chest,

⁵ The redacted video of Burnam's interrogation by Detective Keyser was designated Exhibit 156. Counsel requested a copy, but was informed by the Court Clerk that "the Clerk does not have the means to copy CDs" and so a copy of Exhibit 156 was not provided. Counsel has requested a copy of the exhibit from both defense counsel and the prosecutor's office, but so far been unable to obtain a copy of the exhibit as redacted and presented to the jury. Counsel did receive a copy of the unredacted interrogation video from the prosecutor's office. As a result, this briefing relies on the parties' descriptions of the unredacted video as contained in the transcripts, and has confirmed Burnam and Detective Keynes did discuss the Bud Brown issue, as discussed by the parties. Counsel is continuing follow-up efforts and, if necessary, will move to supplement the briefing if a copy of the redacted exhibit is obtained.

right arm, and side and back of his head. RP 432, 444, 453, 446. A detective testified these injuries, including the finger lacerations, black eye and scratches, could be consistent with being dragged out from the trailer by the dog, or could be consistent with a struggle. RP 446, 452-53.

Burnam agreed the scratches on his chest were a result of being dragged out by the dog. RP 833. He testified he received the black eye when Sweet struck him with the rifle barrel, and received the lacerations to his finger when he attempted to grab the knife away from Sweet. RP 822-23, 855-556, 868.

The doctor who performed the autopsy of Sweet established the primary cause of death was bleeding from between 4-5 stab wounds to her neck. RP 551, 559, 562. In addition, she had several other injuries. RP 528. Most notable were lacerations on her hands, a stab wound to her chest that did not extend past her ribs, and a circular impression on her forehead consistent with a strike by the breech end of the rifle barrel found inside the room. RP 535-36, 538, 544.

The doctor testified the rifle barrel injuries were consistent with either Sweet being struck from above while she laid on the ground or with two people facing one another, shoving the rifle barrel back and forth. RP 558-59. The doctor also testified Sweet's hand lacerations could be either offensive or defensive wounds. RP 554.

Sweet's blood and urine showed methamphetamine and marijuana use, but no other drugs. RP 700-01. Toxicologist Justine Knoy characterized Sweet's methamphetamine level (.95 ml/L) as "abuse." RP 708, 710. Toxicologist Lyndsey Knoy testified Burnam's blood also showed methamphetamine and marijuana use. RP 719. She characterized his methamphetamine level (0.66 mg/L) as exceeding therapeutic use. RP 719.

The toxicologists also testified to the general effects of methamphetamine and marijuana use. RP 711-12. Methamphetamine is a brain stimulant that can alleviate fatigue, cause an adrenaline rush, and create a strong euphoric effect. RP 703. The euphoric effect can cause an individual to believe he or she is stronger than he or she actually is, resulting in a "superman complex." RP 720. Use of methamphetamine "can lead to irritability, aggressiveness, paranoia, risk-taking behavior," as well as agitation, pseudo hallucination, delusions, psychosis, and violence. RP 703, 708. Marijuana can distort a person's spacial and temporal awareness, and even cause hallucinations and paranoia at higher levels. RP 706-07. Although marijuana might be used to alleviate the symptoms of methamphetamine use, marijuana does not "counteract" methamphetamine "in any way." RP 706, 710-11. A person using both

would “potentially have the effects of both compounds acting at the same time.” RP 711.

Blood samples were taken from seven locations, including a wall inside the bedroom, the exterior wall of the residence, the driver’s seat of the truck in the driveway, and a garbage can and a utility box nearby Burnam’s hiding place under the trailer. RP 375, 380, 382, 388. The rifle barrel was also collected. RP 611.

The WSP crime lab tested three areas of the rifle barrel: the breech end interior and exterior, and the center exterior. RP 660-61. These all tested positive for Sweet’s blood. RP 640. Testing also showed a second DNA contributor to the sample obtained from the swab of the center of the barrel, but there was too little DNA to draw any conclusions. RP 641. The muzzle end of the barrel was not swabbed or tested. RP 675, 684.

A sample of blood from the exterior wall of the residence also tested positive for Sweet’s blood. RP 640. Blood on the trash can near Burnam’s hiding place tested positive for Burnam’s blood. RP 640-41. The other blood samples collected by law enforcement were not tested. RP 673, 684. A detective testified that through an oversight, a sample of the smear of blood below the kitchen sink was not collected. RP 763.

4. Closing arguments, verdict and appeal

In closing, the State argued it was undisputed that Burnam killed Sweet, and the primary issue was Burnam's mental state and intent. RP 1042-43. Burnam's suspicion that Sweet was cheating on him provided a motive, and his flight from police showed consciousness of guilt. RP 1048, 1059. As anticipated, the State emphasized the extent of Sweet's injuries, and that Burnam was larger and stronger and sustained relatively fewer injuries, to challenge Burnam's assertion that his fear and his actions were reasonable in self-defense. RP 1061-63, 1090-91.

Burnam's closing argument emphasized that Sweet had stabbed him with the knife and struck him with the rifle barrel before he acted to defend himself. RP 1065. Defense counsel emphasized that the jury must evaluate Burnam's self-defense claim on the basis of all the facts and circumstances known to Burnam at the time, but in keeping with the court's ruling, made no mention of Burnam's knowledge of Sweet's involvement in the prior homicide. RP 1065-66.

The jury found Burnam guilty of count I, first degree murder while armed with a deadly weapon, and count II, interfering with the reporting of domestic violence. CP 68, 69, 72; RP 1096. The court sentenced Burnam to serve 344 months of incarceration on count I, and 364 concurrent days on count II. CP 104, 116. He timely appeals. CP 126.

D. ARGUMENT

BURNAM'S RIGHT TO PRESENT A DEFENSE WAS VIOLATED WHEN THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE REGARDING BURNAM'S BELIEF THAT SWEET PRESENTED A CREDIBLE THREAT TO HIS LIFE.

Burnam sought to testify that he feared Sweet because he knew she had been involved in a prior homicide. This evidence was offered primarily to prove Burnam's state of mind, an essential element of his self-defense claim. By excluding this and other corroborating evidence, the trial court deprived Burnam of his constitutional right to present a defense. If admitted, the evidence would have created a reasonable doubt where there was none before, and so requires reversal.

The Sixth Amendment and Article I, section 22 grant an accused two separate but related rights: (1) the right to present testimony in one's defense and (2) the right to confront and cross-examine adverse witnesses. U.S. CONST., Amend. VI; WASH. CONST., art. I, §22; State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967)); Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). Taken together, these rights constitute the right to present a defense. State

v. Duarte Vela, ___ Wn. App. ___, 2017 WL 3864628 , *5 (2017) (citing State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010)).

These rights are not absolute. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Evidence “must be of at least minimal relevance.” Id. at 622. “[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Id. The State’s interest in excluding prejudicial evidence must also “be balanced against the defendant’s need for the information sought,” and relevant information can be withheld only “if the State’s interest outweighs the defendant’s need.” Id. Where evidence has “*high* probative value ‘it appears no state interest can be compelling enough to preclude its introduction.’” Jones, 168 Wn.2d at 720 (emphasis in original) (quoting Hudlow, 99 Wn.2d at 16).

Generally, a trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion. Diaz v. State, 175 Wn.2d 457, 462, 285 P.3d 873 (2012).⁶ However, a violation of the constitutional right to present a defense is reviewed *de novo*. Jones, 168 Wn.2d at 719.

Here, the trial court rejected Burnam’s proffered testimony and ruled any evidence of Sweet’s prior involvement in the Bud Brown

⁶ Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Untenable reasons include errors of law. Noble v. Safe Harbor Family Preservation Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).

homicide case was not admissible. RP 252. Although the court made no written findings or conclusions, its oral decision appears to be based on the following grounds. (1) Burnam had not made an adequate offer of proof. See RP 246-47, 250. (2) Burnam's testimony was not relevant to any essential element of self-defense. RP 251. (3) The legal standard for character evidence controlled the analysis, and, under this standard, the defense did not meet its burden. RP 248-51 (citing ER 403, 404(b), and 405(b); State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009)). (4) Where the evidence was inadmissible to show character evidence, it was entirely inadmissible. RP 251-52. (5) Case law required this result. RP 249-52. Each of the trial court's grounds was in error.

1. Burnam made a sufficient offer of proof regarding his anticipated testimony.

The trial court's findings suggest Burnam failed to make a sufficient offer of proof regarding the content of his anticipated testimony. See RP 246-47, 250. If made, such a finding was in error. Burnam repeatedly advised the court that he anticipated testifying that he believed Sweet was involved in a prior homicide involving a weapon designed to inflict pain, that she was more involved than her conviction suggested, and that this knowledge contributed to his fear and belief that Sweet intended to kill him and was capable of doing so. CP 21; RP 208-13, 219-23.

Thus, the trial court's finding is not supported by "substantial evidence" in the record, but rather is an obvious error, and should be overturned by this Court. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).⁷

2. Burnam's testimony was highly probative of his claim of self-defense.

The trial court concluded Burnam's testimony had minimal probative value and was not relevant to any essential element of his claim of self-defense. RP 251. This conclusion was in error.

Because Burnam asserted self-defense, he bore the initial burden to produce evidence. Examination of the elements of self-defense, defined by statute and jurisprudence, shows that the objective reasonableness of Burnam's belief of the danger posed by Sweet was a critical element of his self-defense claim. Thus, his testimony offered to explain why he believed Sweet was capable of killing him was highly probative to an essential element of his claim.

When asserting a claim of self-defense, the defendant bears the initial burden to produce "some evidence demonstrating self-defense," at which point the burden shifts to the State to disprove self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d

⁷ "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." Hill, 123 Wn.2d at 647.

1237 (1997) (citing State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); State v. Acosta, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984)).

A homicide is “justifiable” when

(1) [i]n the lawful defense of the slayer ... there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer ... , and there is imminent danger of such design being accomplished; or (2) [i]n the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or ... in a dwelling ... in which he or she is.

RCW 9A.16.050.

Case law further defines the elements of a self-defense claim as follows:

Evidence of self-defense is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” This standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.

Walden, 131 Wn.2d at 474 (quoting Janes, 121 Wn.2d at 238 (citing State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984))).

In evaluating a claim of self-defense, the jury must consider “the defendant’s point of view as conditions appeared to [him] at the time,” and “must place themselves in the shoes of the defendant and judge the legitimacy of [his] act in light of all that [he] knew at the time.” Allery, 101 Wn.2d at 594 (emphasis added) (citing State v. McCullum, 98 Wn.2d

484, 656 P.2d 1064 (1983); State v. Wanrow, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977) (Utter, J. plurality). The jury's consideration must include "*all* the facts and circumstances known to the defendant," even those "prior to" or "substantially predating" the incident. Janes, 121 Wn.2d at 238 (emphasis in original) (citing Wanrow, 88 Wn.2d at 235); Allery, 101 Wn.2d at 595 (citing Wanrow, 88 Wn.2d at 235-36).

Here, the jury was properly instructed that in order to establish self-defense, Burnam must have (a) "reasonably believed" Sweet "intended to inflict death or great personal injury," and (b) "reasonably believed that there was imminent danger of such harm being accomplished." CP 74 (Instruction No. 25); see also WPIC 16.02. Alternatively, Burnam acted lawfully if he killed Sweet while resisting her attempt to commit a felony either (a) upon him, or (b) in a dwelling or place of abode in which Burnam was present. CP 75 (Instruction No. 26); see also WPIC 16.03.

In both instances, Burnam must have "employed such force and means as a reasonably prudent person would use under the same of similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time and prior to the incident." CP 74, 75 (Instruction Nos. 25, 26); see also WPIC 16.02, 16.03.

The statutory definition, jurisprudence, and specific instructions in Burnam's case all emphasized that Burnam must offer proof that his beliefs were reasonable. His belief of Sweet's intent, and of her imminent ability to kill or inflict great bodily harm on him, must be both objectively and subjectively reasonable, and Burnam's use of force in response must also be objectively and subjectively reasonable.

The testimony offered by Burnam, and excluded by the court, was necessary to establish why he feared Sweet, why he believed she intended to and was capable of killing him, and why his use of deadly force was necessary. Burnam sought to testify that he believed Sweet had been more involved in the prior homicide than her misdemeanor conviction for rendering criminal assistance suggested. RP 227-31. He believed she was capable of participating in a violent murder, and escaping with only minor punishment. RP 240. The fact that she had done so once may embolden her to do it again. This explained the depth of his fear when she assaulted him with a knife and later the metal rifle barrel. It explained why he felt his actions were necessary to defend his life.

Because his testimony bore directly on the reasonableness of his beliefs and actions, both of which were necessary elements of his self-defense claim, it was "*highly* probative" evidence. Jones, 168 Wn.2d at 720 (emphasis in original).

3. The trial court excluded the evidence under an incorrect legal standard.

The trial court reasoned the legal standard for character evidence controlled the analysis, and, under this standard, the defense did not meet its burden. RP 248-51 (citing ER 403, 404(b), and 405(b); State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009)). The court further reasoned that under this standard, it was required to find “by a preponderance of the evidence” that Sweet previously had committed a violent act before admitting the testimony. RP 249-51. The court concluded Burnam’s anticipated testimony lacked sufficient credibility or corroboration to meet this standard. See RP 250-51. Also under this standard, the court determined it was required to weigh the probative value of the evidence against the prejudicial effect to the opposing party. RP 251. The court concluded the probative value of Burnam’s testimony was minimal and outweighed by the prejudicial effect to the State. RP 251.

This reasoning is in error for three reasons. First, the court failed to apply the correct legal standard. Second, under the correct standard, Burnam’s testimony may not be excluded on the basis of the trial court’s credibility determination. Third, in the context of the constitutional right to present a defense, highly probative evidence may not be excluded

despite any amount of prejudice to the State. Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 16); Duarte Vela, 2017 WL 3864628 at *6.

First, the trial court failed to apply the correct legal standard. Driven by the State's argument that the evidence should be categorized as a "character attack," the court applied the legal standard from State v. Fisher. RP 250-51 (citing Fisher, 165 Wn.2d 727).

In Fisher, the defendant was charged with child molestation of his former step-daughter. 165 Wn.2d at 733. The State sought to introduce evidence under ER 404(b) of Fisher's prior incidents of abuse, involving the complaining witness, his biological son, and other former step-children. Id. at 734. ER 404(a) provides that evidence of a person's character is generally not admissible to show conformity. ER 404(b) provides that evidence of prior crimes, wrongs, or acts is generally not admissible to prove character and show conformity, but "may, however, be admissible for other purposes."

The trial court found the alleged victim could offer her testimony on this point, in order to explain why she feared the defendant and delayed reporting, but only if the defense opened the door to the issue of her reason for the reporting delay. Fisher, 165 Wn.2d at 744-46.

On appeal, the Fisher Court held the trial court had not abused its discretion in admitting the evidence because (a) it had been offered to

show the testifying witness's state of mind and motivation for action, a recognized and proper purpose, and (b) the trial court properly balanced the probative and prejudicial effects by ruling the evidence admissible only if the defendant opened the door to the issue of the witness's mental state. Id. at 744-46 (citing State v. Nelson, 131 Wn. App. 108, 116, 125 P.3d 1008 (2006) (allowing ER 404(b) evidence for purpose of establishing victim's state of mind); also State v. Cook, 131 Wn. App. 845, 851-52, 129 P.3d 834 (2006) (same)).

If Fisher has any bearing on the issue presented in Burnam's case, it is to establish that ER 404(b) does not preclude testimony regarding specific prior incidents of violence as evidence of a witness's fear and state of mind. Fisher, 165 Wn.2d at 744. More importantly, Fisher involved the testimony of a victim presented by the State, not the testimony of a defendant, and so did not implicate the right to present a defense. Thus, Fisher's ER 404(b) framework has no bearing on the analysis involving a right to present a defense.

Here, the primary purpose of Burnam's testimony was to prove his belief and the reasonableness of his belief as part of his claim of self-defense. RP 213, 219. The trial court recognized this purpose, noting "[t]he defense advocates that this is to show [] what was in the mind of Mr. Burnam. Mr. Burnam advocates Ms. Sweet was capable of hiding a

violent and painful murder and this shows her ability to be violent and act first.” RP 250. Given this acknowledged purpose, the trial court should have analyzed admissibility according to the constitutional right to present a defense.

Under this framework, the correct legal standard was whether Burnam’s testimony was highly probative of an essential element of his self-defense claim. Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 16); Duarte Vela, 2017 WL 3864628 at *6. As discussed above, the question must be answered in the affirmative. Thus, Burnam’s testimony cannot be excluded. Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 16); Duarte Vela, 2017 WL 3864628 at *6.

Second, applying the incorrect legal standard, the trial court found that Burnam’s testimony lacked corroboration or was otherwise too weak to be admitted. RP 250-51. This finding lacks factual support in the record, and is also irrelevant under the correct legal standard.

There is no rule that a defendant may not testify unless his testimony is corroborated or determined credible by the trial court. Rather, a defendant has a constitutional right to testify on his own behalf at trial. U.S. CONST., Amends. V, VI, XIV; State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). This is a fundamental part of the right to present a defense, and is explicitly provided for in the Washington

Constitution. U.S. CONST., Amend. VI; WASH. CONST., art. I, §22; see also Robinson, 138 Wn.2d at 758.

In addition, Burnam did seek to corroborate his testimony by offering a transcript of his interrogation by Detective Keyser, to show that both Burnam and the investigating officer believed Sweet to be more involved in the Bud Brown homicide case than her misdemeanor conviction suggested. RP 992-93. However, conceding that this evidence was excluded by the trial court's prior ruling, defense counsel agreed to redact this section of the recording. RP 994, 996. Counsel was not required to continue similar objections to those already made, where doing so would be a "useless endeavor." State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996). Thus, this Court should not consider the objection waived, but rather find the corroborating evidence was offered and was improperly excluded by the trial court.

This Court recently rejected an identical argument, that such testimony by a defendant should be rejected as "not probative" where a trial court deems it "weak or false." Duarte Vela, 2017 WL 3864628 at *7. There, the Court held "if the evidence is weak or false, cross-examination will reveal this, and any sting caused by the admission of false evidence will not only be removed, but will invite prejudice to the defendant who introduced such evidence." Id. Trial courts "should admit

probative evidence, even if suspect, and allow it to be tested by cross-examination.” Id. This allows the jury to “retain its role as the trier of fact,” rather than for the trial court to usurp this role by determining what evidence is “weak or false.” Id.

Regardless of whether Burnam’s testimony lacked corroboration, or was perceived by the trial court as lacking in credibility, it remained relevant and should have been admitted. Id.

Third, again applying the incorrect legal standard, the trial court reasoned Burnam’s testimony could not be admitted because the probative value was outweighed by prejudice to the State. RP 251. This was an error. Burnam’s highly probative evidence cannot be excluded on the basis of ER 403 balancing.

Under ER 403, even relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” The State encouraged the trial court to “flip the scenario” and consider that the State would not be permitted to offer similar evidence against Burnam to show that he may have been involved in a prior crime, because such evidence would be more prejudicial than probative under ER 403. RP 241. The trial court appears to have found this reasoning persuasive. RP 251.

However, the Court of Appeals recently held “the ER 403 balancing of probative value versus unfair prejudice is weighed differently when the defense seeks to admit evidence that is central to its defense.” Duarte Vela, 2017 WL 3864628 at *6. This is because a defendant has a constitutional right to present a defense; the State does not. Id. This constitutional right requires trial courts to admit highly probative evidence, including specific threats or acts of violence by the decedent known to the defendant at the time of the homicide. Id. (citing Jones, 168 Wn.2d at 720-21). The Duarte Vela Court observed “[w]e have previously held that ER 403 cannot be used to exclude ‘crucial evidence relevant to the central contention of a valid defense.’” Duarte Vela, 2017 WL 3864628 at *6 (quoting State v. Young, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987)).

As discussed above, Burnam’s testimony was highly probative of key elements of his self-defense claim. Therefore, it cannot be excluded on the basis of ER 403.

In summary, the court failed to apply the correct legal standard, improperly acted as gatekeeper to exclude evidence it perceived to lack corroboration or credibility, and engaged in unlawful balancing under ER 403. After recognizing Burnam offered his testimony as evidence of his belief, the trial court should have considered the issue in the context of the

constitutional right to present a defense, and concluded that his highly probative evidence could not be excluded regardless of any prejudice to the State. Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 16); Duarte Vela, 2017 WL 3864628 at *6.

4. Burnam's testimony was admissible for its primary purpose, regardless of its admissibility for any secondary purpose.

Here, Burnam sought to admit evidence of prior incidents primarily to prove his reasonable fear as an element of self-defense. CP 21; RP 208-13. Burnam also offered this evidence for a secondary purpose: to show Sweet's character for violence in support of his contention that she was the first aggressor. CP 21; RP 208-13.

The court should have separated out these two purposes, and engaged in two separate analyses. However, as discussed above, the court appears to have blended the analyses together, adopted an incorrect legal standard, and shoe-horned in a discussion of self-defense claims as one factor in its ER 404 analysis. See RP 247-52.

In the alternative, the court's reasoning could be interpreted as concluding that where the evidence was not admissible as character evidence to prove Sweet was the first aggressor, it was also not admissible for the purpose of showing Burnam's state of mind. See RP 251-52. To the extent the court's ruling reached such a conclusion, it was in error.

Even if the specific incidence of violence was not admissible under the second theory (Sweet's character to prove she was the first aggressor), it should have been admitted under the first (Burnam's reasonable fear to support his claim of self-defense). Had the State so requested, evidence of the specific incident could have been admitted with a limiting instruction. See ER 105; State v. Gallagher; 112 Wn. App. 601, 611, 51 P.3d 100 (2002). Here, Burnam's trial counsel discussed, and did not oppose, a limiting instruction. RP 250.

To the extent the trial court's ruling can be interpreted as concluding evidentiary rules with respect to a secondary purpose overrode the defendant's constitutional right to present a defense, such a ruling was in error. See Duarte Vela, 2017 WL 3864628 at *8-9.

5. A correct reading of jurisprudence requires admissibility.

The trial court concluded that binding precedent required exclusion of Burnam's testimony. Specifically, the court reasoned that Adamo was in conflict with "if not abrogated by" Hutchinson and similar cases discussing principles of admissibility under ER 403, 404(b), and 405(b). RP 251 (citing State v. Adamo, 120 Wash. 268, 207 P. 7 (1922); Hutchinson, 135 Wn.2d 863). The trial court's reasoning is in error. As discussed below, a correct reading of Hutchinson shows that it does not abrogate Adamo, and its reasoning does not apply to the case at bar.

In Adamo, the defendant was convicted of killing Gracio. Adamo, 120 Wash. at 269. Adamo offered the testimony of another witness that during a quarrel in 1916, Gracio “made a movement to his hip as if to draw a gun and made threats of violence against the witness,” and that Adamo knew these facts prior to killing Gracio. Id. The Adamo Court noted that testimony of prior incidents of violence, if known to the defendant prior to the homicide, was generally admissible because it “tends to show the state of mind of the defendant at the time of the killing, and to indicate whether he at that time had reason to fear bodily harm.” Id. (internal citations omitted). However, the Court reasoned in Adamo’s case, the prior violence occurred five years before the homicide, and so the trial court had not erred in excluding evidence of an incident that was “too remote.” Id. at 270 (internal citations omitted).

The Adamo Court contrasted its analysis of this testimony with testimony offered to establish another incident of violence by Gracio in 1918. That testimony was not admissible to show Adamo’s state of mind because there had been no showing that Adamo knew of the incident prior to the homicide. Id.

Evidence of the 1918 incidence was also not admissible under a separate theory. Id. The Adamo Court noted that an alleged victim’s general reputation and character for aggression was admissible to support

a defendant's contention that the alleged victim was the first aggressor, but such evidence could not be proved by specific incidents. Id.

Under Adamo, any evidence of Sweet's involvement in a prior incident of violence is admissible if there is a showing that such evidence was communicated to Burnam prior to Sweet's death. Id. at 269-71. Here, Burnam's offer of proof included his own testimony that he was aware of Sweet's involvement in the prior homicide. RP 213, 219. The recording of Detective Keynes' interrogation of Burnam also established that Burnam had knowledge of these events prior to Sweet's death. RP 989-90, 992. Thus, any evidence known to Burnam at the time of Sweet's death, including Sweet's involvement, her guilty plea to rendering criminal assistance, and the detective's interrogation of Bud Brown, is all admissible to establish or corroborate Burnam's state of mind. The redacted portions of Burnam's interrogation video are admissible both as corroboration and to establish the existence of Burnam's belief at the time of the homicide.

The Adamo Court put an additional limitation on such evidence, holding that it was admissible only if not "too remote" in time. Adamo, 120 Wash. at 270. However, as discussed more below, a recent case cast doubt on the constitutionality of such a rule in light of a defendant's right to present a defense. Duarte Vela, 2017 WL 3864628 at *7-8.

Aside from the remoteness rule, Adamo's reasoning has not been abrogated by more recent jurisprudence. A proper reading of Alexander and Hutchinson shows that these cases are in conformity with Adamo and support admissibility.

During Burnam's hearing, the trial court cited to State v. Alexander, for the rule that an alleged victim's general character for aggression, offered to show the alleged victim was the first aggressor, is not an essential element of self-defense. RP 248; State v. Alexander, 52 Wn. App. 897, 900, 765 P.2d 321 (1988). The trial court believed that Alexander and Hutchinson abrogated Adamo, and precluded admissibility of Burnam's evidence. RP 248, 251-52. This is incorrect. Rather, Alexander and Hutchinson both address the admissibility of prior incidents of violence by the alleged victim that were not known to the defendant at the time of the alleged crime by the defendant. Their holdings are not relevant to the question presented in Adamo and the case at bar: the admissibility of prior incidents that were known to the defendant at the time of the alleged crime.

In Alexander, the defendant was convicted of assaulting Dunne. Alexander, 52 Wn. App. at 898. The parties knew each other, and although details were not agreed, they had previously loaned or asked for money from one another. Id. In mid-1986, Alexander worked as a cook

and Dunne played in a band in the same restaurant. Id. After a dispute and confrontation over money, Alexander threw a pot of hot grease at Dunne. Id. at 899.

Alexander asserted self-defense. Id. at 899. During his assault trial, Alexander was permitted to testify that he believed Dunne wanted to hurt or kill him. Id. at 899. He was also permitted to testify to (1) Dunne's general reputation for violence, and (2) a specific incident that Alexander believed was threatening, i.e. that "he had previously seen Dunne with a shotgun and a knife and had heard Dunne bragging about being a whipping expert." Id. Alexander testified that he knew of Dunne's reputation and of this incident before the alleged assault, and that both contributed to his fear at the time. Id. The admissibility of this testimony was not challenged on appeal. See id. at 900.

The trial court excluded testimony from two other defense witnesses who sought to testify to other prior incidents of violence by Dunne. Id. at 899-900. Nothing in the record indicates that Alexander was aware of these incidents at the time of the alleged assault. See id. at 988-900. Alexander sought to introduce this testimony as evidence of Dunne's general character for violence, to show Dunne acted in conformity with this trait and was the first aggressor. Id. at 900. The trial court allowed these witnesses to testify to Dunne's general character for

violence, but limited the testimony to opinion and reputation evidence, excluding any discussion of specific acts. Id. at 900. Alexander appealed this second evidentiary ruling, arguing the specific acts were admissible to show Dunne's character for aggression in support of the defense assertion that Dunne was the first aggressor. Id.

The Alexander Court held that the trial court's rulings were correct. Id. at 901. The court reasoned that where Alexander claimed Dunne was the first aggressor, Dunne's character trait for aggression was pertinent, and therefore admissible under ER 401 and 404(a)(2). Id. at 901. However, "[f]or character to be an essential element, character itself must determine the rights and liabilities of the parties." Id. at 901 (citing State v. Kelly, 102 Wn.2d 188, 197, 685 P.2d 564 (1984)). The Court of Appeals held "[h]ere, Dunne's character trait of violence is not an essential element of Alexander's claim of self-defense" because Alexander's self-defense claim could be resolved without any character evidence. Id. at 901 (emphasis added). Therefore, the evidence of Dunne's character for violence could be introduced only through opinion and general reputation, but not through specific acts. Id. at 901 (citing ER 405(a), (b)). This was in the context of a trial where Alexander's own testimony regarding his beliefs and knowledge was unrestricted.

From context, it is clear the court's holding was limited to specific acts of violence that were not known to the defendant at the time of the incident. Where the incidents were not known to Alexander at the time, they had no bearing on the existence or reasonableness of his fear of Dunne, and so had no direct relevance to an essential element of his claim of self-defense. The court then analyzed whether they were relevant to the issue of whether Dunne was the first aggressor, and found such testimony was limited to opinion and reputation. Id. at 901.

The Alexander Court's decision has no bearing on whether evidence of the prior homicide involving Sweet was admissible, as this incident was known to Burnam at the time of her death. Rather, a proper reading of Alexander supports admissibility; the Alexander trial court permitted the defendant to testify regarding prior incidents known to him. Burnam's testimony, and corroborating evidence, should have been admitted in accordance with Alexander.

Hutchinson also supports admitting Burnam's testimony and corroborating evidence. 135 Wn.2d 863. In Hutchinson, the defendant was arrested for driving under the influence in 1987. Id. at 867. Hutchinson had concealed a handgun in his waistband, but officers failed to discover it during a search incident to arrest. Id. Hutchinson shot and killed two deputies and fled. Id. at 868. The defendant sought to

introduce evidence of Deputy Heffernan's performance evaluation from 1980, which stated the deputy had "lost his composure" and was "aggressive" and "physical" toward intoxicated arrestees. Id. at 870. Hutchinson also made an offer of proof of the entire department's reputation for violence, and of specific acts of violence by Deputy Heffernan. Id. The trial court ruled that evidence of the deputy's character for violence could only be brought through witness testimony regarding his general reputation, not through specific acts or the performance evaluation. Id.

The Washington Supreme Court upheld the ruling. Id. at 886 (citing Alexander, 52 Wn. App. at 900). The Hutchinson Court reasoned that evidence of a person's character for aggression to show conformity is generally not permitted. Id. at 886 (citing ER 404(a)). However, where a defendant asserts self-defense and that the alleged victim was the first aggressor, an alleged victim's character for aggression becomes admissible as a pertinent trait. Id. at 886 (citing ER 404(a)(2), 405(a)). The method of introducing such evidence is still limited. Id. Specific acts could be used to prove a trait only where it is an essential element of the defense. Id. at 886-87 (citing ER 405(b)). Proof of the alleged victim's character for violence, standing alone, was not an "essential element" of the claim of self-defense, and so was properly limited to introduction by

opinion and general reputation; specific acts must be excluded. Id. at 887 (citing Alexander, 52 Wn. App. at 901).

In Hutchinson, there was no indication that the defendant had ever met or heard of Deputy Heffernan before the incident, much less that he was aware of his performance evaluation, his reputation or any specific incidents of violence by the deputy. C.f. id. at 868-70. The Court therefore concluded “the Defendant’s claim of self-defense was not dependent upon his being able to show Deputy Heffernan had a propensity toward violence.” Id. at 887.

The Hutchinson Court relied heavily on the analysis from Alexander and, like Alexander, was limited to considering incidents that were not known to the defendant at the time of the alleged crime. Id. at 887 (citing Alexander, 52 Wn. App. at 901). As such, the holding does not control the issue presented by Burnam’s case and is not in conflict with the analysis of the Adamo Court, both cases in which the defendant offered evidence of his state of mind, and of incidents known to him at the time of the alleged crime. CP 20-23; RP 208-13; Adamo, 120 Wash. at 270.

The specific issue presented by Burnam’s case was recently addressed by Division III in Duarte Vela, 2017 WL 3864628. This case

controls the analysis and requires admission of the evidence offered by Burnam.

Duarte Vela was charged with the murder of Menchaca, who had previously been married to Duarte Vela's sister, Blanca. Id., 2017 WL 3864628 at *1. Duarte Vela did not dispute that he had shot and killed Menchaca, but asserted self-defense. Id. The trial court permitted Duarte Vela to testify regarding the interaction that occurred that day, and to his fear of Menchaca. Id. However, the trial court excluded evidence that Duarte Vela sought to introduce to explain why he feared Menchaca, and the degree of harm that he feared. Id. This included the following three categories of testimony.

First, the trial court excluded various statements by Duarte Vela regarding his feelings, thoughts, and impressions leading up to the incident, as well as statements made by his wife, present at the time, all of which he asserted contributed to his fear of Menchaca. Id. at *4.

Second, the trial court excluded evidence of Menchaca's prison threat. Duarte Vela offered the testimony of his brother Alphonso, to establish that while in prison two or three years prior, Menchaca had threatened to kill Duarte Vela's entire family, and that Alphonso had told Duarte Vela of this threat. Id. at *2-3. Duarte Vela argued this was admissible to show his state of mind, that his fear of Menchaca was

reasonable, and both issues were elements of his claim of self-defense. Id. at *2. The trial court ruled that Alphonso could be called as a witness, but “[i]f [Menchaca] was released two or three years ago, then indeed this is too remote.” Id. at *2. The State later produced evidence showing Menchaca had been released from prison and deported to Mexico two and a half years before the trial. Id. In light of the court’s ruling, Duarte Vela did not call his brother to testify. Id.

Third, the trial court excluded testimony by Duarte Vela’s sisters and wife of Menchaca’s acts of violence toward Duarte Vela’s sisters, including ongoing battering of one sister that had ended with their marriage 5-6 years prior to the trial, and abduction of another sister in 2007 (approximately 7 years prior to the trial). Id. at *3-4, 8.

The State argued this excluded evidence was inadmissible because it “was either (a) hearsay, (b) untrustworthy, (c) too remote in time, (d) improper character evidence, or (e) speculative.” Id. at *5. On appeal, Division III held evidence known to Duarte Vela at the time of the shooting, and offered to explain the existence, extent, or reasonableness of his fear of Menchaca, was admissible as an essential element of his claim of self-defense. Id. at *6-8. In its holding, the Duarte Vela Court found neither Adamo nor Hutchinson controlling. Id. at *8-9.

The Court found Adamo was not controlling for both factual and doctrinal reasons. Id. at *7-8. First, as a factual matter, Menchaca's prison threat was not as remote. Id. at *7. It had occurred two years prior, whereas the incident in Adamo had occurred five years prior to the killing. Id. Second, there was a factual reason for the delay; Menchaca had been deported to Mexico, which may have delayed the execution of his threat. Id. at *8. Third, and most relevant, Adamo had never analyzed the evidence in light of the constitutional right to present a defense. Id. at *8. Intervening case law had altered the calculus for the admissibility of evidence supporting a defendant's version of events. Id. at *8 (citing Jones, 168 Wn.2d at 720-21). The Duarte Vela Court concluded that testimony of Menchaca's prison threat "was more than minimally relevant, and in fact was the most important evidence to establish Duarte Vela's self-defense claim," and so must be admitted. Id. at *8.

The Court also remanded the issue of admissibility of the evidence establishing abuse and abduction of Duarte Vela's sisters. Id. at *8. The Court found the record was unclear regarding whether Duarte Vela's knowledge of the abuse and abduction heightened his fear of Menchaca or caused him to assign more credibility to his prison threat. Id. As a result, the Court instructed the trial court to admit the evidence if it found that knowledge of the incidents did contribute to Duarte Vela's fear. Id.

These events occurred between five to seven years prior to trial, as compared to the five year old incident excluded in Adamo as “too remote.” Id. at *3; Adamo, 120 Wash. at 269. Division III’s direction to the trial court, to admit this evidence if relevant to Duarte Vela’s state of mind, shows that Adamo’s rule of remoteness must give way to a defendant’s constitutional right to present a defense.

The Duarte Vela Court also rejected the State’s argument that prior incidents of violence known to the defendant could be rejected as improper character evidence. Id. at *8-9. The testimony offered by Duarte Vela was distinguishable from that in Hutchinson because Hutchinson did not know the deputy. Id. at *9 (citing Hutchinson, 135 Wn.2d at 867-70; ER 404(a)(2), 405). Thus, the prior acts of violence were not relevant to Hutchinson’s state of mind, and Hutchinson sought to admit the evidence under another theory: evidence of the alleged victim’s character for violence. Duarte Vela, 2017 WL 3864628 at *9. The court reasoned that here, Duarte Vela was not attempting to prove Menchaca’s character, but rather “ to establish that he reasonably feared Menchaca because of what he believed about Menchaca at the time he shot him.” Id. at *9. As such, the testimony was admissible.

Like the prison threat in Duarte Vela, Burnam knew of Sweet’s prior incident of violence and this contributed to his fear of Sweet. RP

209-10. The evidence was critical to an essential element of his self-defense, and Adamo's rule of remoteness, now of questionable constitutionality, must give way. Duarte Vela, 2017 WL 3864628 at *8.

As discussed above, the fact that Burnam's testimony had a secondary character evidence purpose could have been addressed by a limiting instruction, and does not justify exclusion.

6. The trial court's evidentiary rulings require reversal.

The erroneous exclusion of evidence relevant to Burnam's self-defense claim violates his constitutional right to a defense if "the omitted evidence evaluated in the context of the entire record, creates a reasonable doubt that did not otherwise exist." Duarte Vela, 2017 WL 3864628 at *9 (citing United States v. Blackwell, 459 F.3d 739, 753 (6th Cir.2006)). In Duarte Vela, Division III reasoned that the trial court's ruling had prevented the defendant from offering evidence of why he feared Menchaca, and also from presenting testimony of other witnesses to corroborate that they had in fact told the defendant of prior incidents of violence by Menchaca. Id. at *9. This established a reasonable doubt that did not otherwise exist. Id.

The evidentiary rulings in Burnam's case are essentially the same. By ruling that all evidence of Sweet's prior conduct was inadmissible, the trial court excluded both Burnam's direct testimony regarding why he

feared Sweet, as well as corroborating evidence from other sources, including a transcript of Bud Brown's interrogation and the primary investigating officer's report, testimony from Detective Keynes and the transcript of Burnam's interrogation by Keynes, and court records showing Sweet's guilty plea and conviction. RP 252, 994, 996.

This left the jury with an incomplete picture at best. The jury had evidence that Sweet was under the influence of methamphetamines, but Burnam was as well. RP 700-01, 719. During cross-examination, the State drew out that Burnam was considerably taller and stronger than Sweet. RP 836-37. Without Burnam's understanding of Sweet's involvement in a prior homicide, the jury had little reason to accept Burnam's fear of Sweet as reasonable, and the State emphasized this point heavily in closing argument. RP 1061-63, 1090-91. As in Duarte Vela, admission of the improperly excluded evidence creates a reasonable doubt that otherwise did not exist. Duarte Vela, 2017 WL 3864628 at *9-10. The evidentiary rulings violated Burnam's constitutional right to present a defense and require reversal. Id.

E. CONCLUSION

The trial court violated Burnam's Sixth Amendment right to present a defense by excluding all evidence of Sweet's prior involvement in a homicide.

Burnam respectfully requests that this Court reverse his conviction for first degree murder and remand for a new trial.

DATED this 25th day of September, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


A handwritten signature in cursive script, reading "E. Rania Rampersad", is written over a horizontal line.

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